SUPREME COURT, U. S.

FILED

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1321

FRANCIS HAMILTON GRISWOLD,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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IN THE SUPREME COURT OF THE UNITED STATES

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No._____

FRANCIS HAMILTON GRISWOLD,

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vs.

THE STATE OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arizona, entered in the above entitled case on January 25, 1967.

The opinion of the Supreme Court of Arizona is reported at 101 Ariz. 577, 422 P.2d 693 (1967). It is attached as Appendix B hereto.

Jurisdiction

The decision of the Supreme Court of Arizona was filed on January 25, 1967. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3). The matter in the Supreme Court of Arizona was an appeal from a judgment and sentence entered against petitioner by the Superior Court of Arizona in and for the County of Apache on March 30, 1966. This judgment and sentence ordered petitioner to be confined in the state prison for a term of not less than 36 and not more that 40 years, from March 30, 1966, following defendant's conviction upon a plea of guilty to the charge of murder in the second degree. The issue in the case is the interpretation of two Acts of Congress, the New Mexico-Arizona

Enabling Act, June 20, 1910, Ch. 310, 36 Stat. 557, as amended, and 18 U.S.C. Sec. 1152, attached as Appendix A. This issue was raised in the brief of appellant in the Arizona Supreme Court and the issue has been preserved in all subsequent proceedings. The court below interpreted the Acts of Congress adversely to the contention of petitioner here, and the entire opinion of that court (Appendix B, infra) concerns the interpretation of these Acts of Congress, together with the question of the length of sentence imposed upon petitioner. The order of the court below was entered on January 25, 1967, as a part of its opinion in the case.

Question Presented

Whether an Act of Congress requiring the people of Arizona to disclaim all right and title to all lands within the boundaries of the state owned or held by Indian tribes and placing these lands under the absolute jurisdiction and control of the Congress of the United States permits the State of Arizona to exercise jurisdiction over petitioner, a non-Indian, as the result of the killing of a non-Indian within the boundaries of an Indian reservation.

Statutes Involved

The first statutory provision involved is Sec. 20(2) of the New Mexico-Arizona Enabling Act of 1910, 36 Stat. 557, 569-70, as amended. The statute is set forth in Appendix A. The essential language of Sec. 20(2) is as follows:

> "[A constitutonal convention shall include the following provision in the State Constitution as a condition of admission of Arizona into the Union]:
>
> "2. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute control of the Congress of the United States."

This disclaimer of jurisdiction over the Indian country was incorporated verbatim in Article 20 of the Arizona Constitution.

18 U.S.C. Sec. 1152 is also involved in this case. This section provides that:

> "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country."

Statement

1. *The Legal Background.*

Under the New Mexico-Arizona Enabling Act, the people of Arizona were required to adopt in their constitution, as a condition for admission, the provision quoted in the "Statutes Involved" section above; Arizona thus specifically disclaimed jurisdiction over all lands within the State owned or held by any Indian or Indian tribes, the right or title to which had been acquired through or from the United States or any prior sovereignty. The condition imposed by the Enabling Act further provided that "until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

Other western states have adopted substantially the provisions disclaiming jurisdiction.* These provisions were required in the light of prior holdings by this Court that the Indian country remains such so long as Indians retain the title to their soil, see, *e.g., Bates v. Clark,* 95 U.S. 204, 24 L.Ed. 471 (1877), and that until the States assume jurisdiction over the Indian lands, all as-

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* States originally having such disclaimers of civil and criminal jurisdiction included Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Since the passage of the Act of August 15, 1953, Sec. 7, Ch. 505, 67 Stat. 588, 590, permitting the removal of this disclaimer, a number of states have done so. Arizona, however, has not. Crosse, *Criminal and Civil Jurisdiction in Indian Country,* 4 Ariz. L. Rev. 57, 63-64 (1962).

pects of the jurisdictional relationship between whites and Indians were to be apportioned between the tribal and federal courts. *United States v. Rogers,* 45 U.S. (4 How.) 567, 11 L.Ed. 1105 (1846). The Colorado Enabling Act did not require a disclaimer of the sort found in the Arizona enactment. Accordingly, in *United States v. McBratney,* 104 U.S. 621, 26 L.Ed. 869 (1882), this Court held that Colorado assumed jurisdiction over the Indian lands within its boundaries when it became a State. But this Court then ruled in a case involving the Montana Enabling Act, containing a disclaimer provision similar to that in Arizona, that this disclaimer was not sufficient to cause a state court to relinquish jurisdiction over an offense committed by a non-Indian against a non-Indian on a reservation. *Draper v. United States,* 164 U.S. 240, 17 S.Ct. 107, 41 L. Ed. 419 (1896). For the reasons discussed in the succeeding portions of this petition, it is petitioner's position that the *Draper* case was wrongly decided and should now be overruled.

2. *The Present Case.*

On October 4, 1965, a criminal complaint was issued by the Justice Court of Fort Defiance Precinct, Apache County, Arizona, alleging that petitoner:

> "Wilfully, unlawfully, and feloniously, kill[ed] and murder[ed], Elsa Muriel Griswold, with malice aforethought, . . . at Nazlini Trading Post, Nazlini, Arizona."

The Nazlini Trading Post is located on the Navajo Indian Reservation, within the boundaries of Apache County, Arizona. Petitioner is an Indian trader who operated the Nazlini Trading Post and another trading post on the Navajo reservation, located at Pine Springs.

Petitioner was held in custody without bail by the Justice Court until October 25, 1965, the date of the preliminary hearing. The preliminary hearing was conducted in the Council Chambers of the Navajo Tribe, at Window Rock; the Justice Court ordered defendant be held to answer, without bond, upon a finding of probable cause that the petitioner was guilty of the offense charged. Petitioner remained in the Apache County Jail until the conclu-

sion of his sentencing hearing on March 30, 1966.

An information alleging that petitioner had committed murder was filed on November 16, 1965. Petitioner pleaded not guilty to this information. His attorney then filed a petition for writ of habeas corpus which attacked the sufficiency of the evidence at the preliminary hearing to justify binding petitioner over to the Superior Court. This petition was denied. A trial date of March 21, 1966, was set. Motions for continuance and for change of venue were denied, and a motion to produce and allow inspection was in part granted and in part denied.

On March 18, 1966, petitioner changed his plea from not guilty to guilty of the charge of second degree murder. He was sentenced on March 30, 1966, to a term of 36 to 40 years in the State Penitentiary. Petitioner is a man of 65 years of age. (T. 29).* Under Arizona law, the earliest time at which petitioner could expect to be paroled is fifteen years. A.R.S. Sec. 31-251, 31-252; see generally Tegart, *Computation of Prison Time,* 1966 Arizona Annual Special Review 11. At the time of the sentencing hearing, counsel stated that petitioner's only prior arrest had been while driving under the influence of intoxicating liquor, (T. 31) and that petitoner was considered a substantial business man in Gallup, New Mexico and in Cortez, Colorado. (T. 31).

Notice of appeal to the Arizona Supreme Court was filed on May 24, 1966. That court's opinion was entered on January 25, 1967. In addition to the appeal from the conviction itself, both the Superior Court and the Supreme Court of Arizona were petitioned to declare that there was probable cause to admit the defendant to bail pending the outcome of the appeal and to fix a reasonable amount for bail. Both courts declined to do so, relying primarily upon the *Draper* case.

Reasons for Granting the Writ

A. *The Holding of the Arizona Supreme Court that the*

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* References to the reporter's transcript of the sentencing hearing are designated "(T. ——)" in this Petition.

Superior Court had Jurisdiction to Try Petitioner Conflicts with Section 20(2) of the New Mexico-Arizona Enabling Act and 18 U.S.C. Sec. 1152.

This case involves a crime committed by a non-Indian against a non-Indian on an Indian reservation. While no objection to the jurisdiction of the Superior Court was made either at the preliminary hearing or at the time of sentencing, under Arizona law the question of jurisdiction over the subject matter may not be waived by counsel; the question goes to the heart of the court's authority to hear a case and the jurisdictional argument may be made for the first time on appeal. See *Rojas v. Kimble,* 89 Ariz. 276, 361 P.2d 403 (1961); *D. W. Onan & Sons v. Superior Court,* 65 Ariz. 255, 179 P.2d 243 (1947); *In re Baxter's Estate,* 22 Ariz. 91, 194 P. 333 (1921); *Parker v. Uchida,* 14 Ariz. 57, 125 P. 715 (1912). The Arizona Supreme Court considered the question of jurisdiction and held that the Superior Court did have jurisdiction over the petitioner.

The history of the relationship between the Indian tribes and the United States dates from the earliest days of this country. As early as 1802, Indian country was defined by statute. Act of Mar. 30, 1802, 2 Stat. 139. The Act of June 30, 1834, Ch. 161, Sec. 1, 4 Stat. 733, described vast areas of the United States as Indian country. Although this section was not continued in effect when the Revised Statutes of 1873 were promulgated, the definition of Indian country itself was carried forward. See *United States v. LeBris,* 121 U.S. 278, 7 S.Ct. 894 (1887); *Ex parte Crow Dog,* 109 U.S. 556, 3 S.Ct. 396 (1883). Under *United States v. Rogers, supra,* the federal courts were held to have jurisdiction over the murder of a white man by a white man in Indian country, under Section 25 of the Act of June 30, 1834. This statute was later incorporated in Revised Statutes of 1878 as Sec. 2145, and now appears in the United States Code as 18 U.S.C. Sec. 1152.

A review of legislative history through the years shows that Congress has been repeatedly concerned with federal jurisdiction over crimes committed by non-Indians against non-Indians on Indian reservations, and has specifically intended to confer juris-

diction upon federal courts in such circumstances.* Under a treaty entered into with the Navajos on September 9, 1849, 9 Stat. 974, the tribe was placed under the exclusive jurisdiction and protection of the Government of the United States. That provision of this treaty is complemented by the provisions of the New Mexico-Arizona Enabling Act referred to above and by Article 2 of the Treaty of June 1, 1868, 15 Stat. 667. The United States agreed that no one except those officers of the Government

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* As early as 1834, in the discussion of a proposed statute that would remove from federal courts jurisdiction of offenses committed by or against Indians, the following appeared:

"In consequence of the change in our Indian relations, the laws relating to crimes committed in the Indian country, and to the tribunals before whom offenders are to be tried, require revision, while the act of 3d March, 1817 [3 Stat. 383], the criminal laws of the United States were extended to *all persons* in the Indian country, without exception, and by that act as well as that of 30th March, 1802 [2 Stat. 139], they might be tried wherever apprehended. It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather a courtesy than a right that we undertake to punish crimes committed in that territory by and against our own citizens." H. Rep. No. 474, 23rd Cong., 1st Sess., 13 (1834).

At page 18 of this report, the committee stated:

"The right of self government is secure to each tribe, with jurisdiction over all persons and property within its limits, subject to certain exceptions, founded on principles somewhat analogous to the international laws among civilized nations.

"Officers and persons in the service of the United States, and persons required to reside in the Indian country by treaty stipulations, must necessarily be placed under the protection and subject to the laws of the United States. To persons merely traveling in the Indian country the same protection is extended. The want of fixed laws, of competent tribunals of justice, which must for some time continue in the Indian country, absolutely requires for the peace of both sides that this protection should be extended. Some provision, however, seems necessary to prevent the violation of the laws of the tribes, when such violation would not be an infringement of the laws of the United States. For this purpose power is given to the Governor to remove offenders from their limits; and for offenses against the United States, to secure and remove them for trial.

"As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes."

or of the Indians authorized to enter upon Indian reservations in discharge of duties imposed by law would be permitted to enter the reservation.

In 1953, Congress enacted a statute, Ch. 505, 67 Stat. 588, 590 (1953), 28 U.S.C.A. Sec. 1360(note), which permitted the states to accept civil and criminal jurisdiction over the Indian reservations inside their boundaries; states such as Arizona having impediments in their enabling acts to the assumption of such jurisdiction were permitted to remove them. A number of states have taken this action, but Arizona has not as yet done so. The report accompanying this bill makes it clear that until such time as a state acts affirmatively to remove the impediment to jurisdiction over Indian lands contained in its enabling act, exclusive federal jurisdiction exists over the lands until Indian title to them is extinguished.*

This Court has recognized that a state may legislate concerning federal or Indian land only in the absence of legislation by Congress on the subject. In *State v. Omaechevarria,* 246 U.S. 343, 346, 38 S.Ct. 323, 62 L.Ed. 763 (1918), the Court held that "the police power of the state extends over the federal public domain, at least when there is no legislation by Congress on the

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* "Examination of the Federal Statutes and State Constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these States — in the absence of consent being given for future action to assume jurisdiction — is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure." S. Rep. No. 699, 83d Cong., 1st Sess. (1953), 1953 U.S.C.C.A. 2409, 2412.

See also Letter from Orme Lewis, Ass't Secretary of the Interior, to Senator Miller, July 7, 1953, 1953 U.S.C.C.A. at 2413, 2414, stating that Congressional consent would be required and the constitutions would have to be amended in States having disclaimer provisions before the States could legally assume jurisdiction over Indian land within their boundaries.

subject." And, in *People of the State of New York v. Martin,* 326 U.S. 496, 499; 66 S.Ct. 307, 90 L.Ed. 261 (1946), the Court followed *McBratney, supra,* to hold that *"in the absence of a limiting treaty obligation or Congressional enactment,* each state had a right to exercise jurisdiction over Indian reservations within its boundaries." (Emphasis added.) The Court there held that the state court had jurisdiction over a non-Indian in the absence of any reservation of jurisdiction by the federal government, either by statute or by treaty.

B. *Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896), is Inconsistent with the Above Statutory and Decisional Pattern, was Wrongly Decided, and Should Be Overruled.*

Were the present issue one of first impression, there seems little doubt that the provisions of the Enabling Act and the Arizona Constitution would be given their plain effect and the Arizona court would have no jurisdiction over the present situation. However, the Court in *Draper v. United States,* 164 U.S. 240, 17 S. Ct. 107, 41 L.Ed. 419 (1896), in construing the provisions of the Montana Enabling Act, held that a disclaimer of jurisdiction virtually identical with the Arizona provision did not amount to a reservation by the United States of jurisdiction over crimes committed on Indian lands by or against non-Indians.

The *Draper* decision was wrongly decided for two reasons: First, the Court relied upon *United States v. McBratney, supra,* although that case did not involve an express disclaimer of jurisdiction such as was involved in the Montana Enabling Act. Second, the Court did not refer to, rely upon, or apply the present 18 U.S.C. 1152, which was in force at that time as Revised Statute Sec. 2145. This statute provided:

> "The general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

This section, which was not argued in the briefs in *Draper,* pro-

vides a full answer to the principal argument of the *Draper* Court that were it to be held that the states had no jurisdiction over offenses involving non-Indians on an Indian reservation, there would be no jurisdiction over the offense at all. Under this section, United States law applies to such offenses, and jurisdiction over the offense would exist in the federal district court.

Additionally, the *Draper* case should be overruled because it is inconsistent with the later holdings of this Court in *People of the State of New York v. Martin, supra,* and *Williams v. United States,* 327 U.S. 711, 66 S. Ct. 778, 90 L.Ed. 962 (1946). In *Williams,* the Court held that the federal district court, not the Arizona superior court, had jurisdiction of an offense committed by a non-Indian against an Indian on an Indian reservation. The *Draper* case was distinguished in passing. The case of *People v. Martin, supra,* also followed *McBratney, supra,* to hold that New York had the right to exercise jurisdiction over Indian reservations within its boundaries *in the absence of a limiting treaty obligation or Congressional enactment.* New York, as one of the original states forming the Union, does not have an enabling act with the same sort of disclaimer as exists in Arizona.

The *Draper* holding is incongruous because it requires the question of state court jurisdiction to turn on the race of the victim or the ownership of the property affected, rather than upon the identity of the accused or the nature of the crime. This Court in *Organized Village of Kake v. Egan,* 369 U.S. 60, 82 S. Ct. 562, 7 L.Ed. 2d 573 (1962), has emphasized the importance of promoting the independence and continued development of the government of the Indian tribes. The presence of state officials investigating cases involving whites to make the preliminary determination whether the victim is a non-Indian or the property stolen is the property of a non-Indian necessarily requires a continuing interference with the self-government of the Indian tribes as well as undue interference with the federal-Indian relationship that has been so carefully established by Congress through the years.

The holding of the *Draper* case is also inconsistent with deci-

sions of this Court in the areas of taxation and trade. In *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L.Ed.2d 251 (1959), this Court held than an Indian trader could not bring an action in the Arizona courts to collect a debt for goods sold on credit to an Indian on the reservation:

> "It is immaterial that respondent is not an Indian. He was on the Reservation when the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations." 358 U.S. at 223.

Similarly, in *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 690, 85 S. Ct. 1242, 14 L.Ed.2d 165 (1965), the Court ruled that Arizona could not impose a sales tax on the "gross proceeds of sales, or gross income" of an Indian trader because "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."

C. *Established Principles of Statutory Construction Permit the Court to Overrule the Draper Case.*

Two arguments that might be raised to defeat this petition, relating to statutory construction, should be specifically met. The first argument, that there has been no showing that the existing construction of the statute has produced "any particularly unfortunate consequences," *Canada Packers Ltd. v. Atchison, Topeka & Santa Fe Ry. Co.*, — U.S. —, 87 S.Ct. 359, — L.Ed.2d — (1966), may be simply refuted by describing the situation that has resulted on the Indian reservations under the present construction. Where the jurisdiction of the court over a particular offense turns on the identity of the victim or the owner of the property affected, state law enforcement agencies are necessarily involved in every case occurring on the reservation, until such time as it is determined that the crime involved is not committed by a non-Indian against the person or property of a non-Indian. The presence of state law enforcement agencies is destructive of the carefully developed relationship between the federal and Indian authorities. Further, the existing practice of state law en-

forcement agencies operating to some limited extent on the reservation is inconsistent with the authorized manner of giving the states jurisdiction by amendment of their Enabling Acts and to that extent frustrates the intent of Congress to allow the states to assume jurisdiction in an orderly way.

The other statutory construction argument was made by the Arizona Supreme Court in its opinion. This argument was that since the New Mexico-Arizona Enabling Act was adopted following the decision of the *Draper* case, there was acceptance by Congress of the prior construction of the Montana statute by the Court. The short answer to this argument is that there is no indication in the legislative history of the New Mexico-Arizona Enabling Act that Congress was aware of the *Draper* decision. Further, the Act of August 15, 1953, ch. 505, 67 Stat. 588, 590 would have been superfluous had Congress in fact been aware of the Court's prior refusal to effectuate the Montana disclaimer in *Draper*. Where there is no affirmative indication that Congress ever had the prior decision before it, the principle relied upon by the Arizona Supreme Court is of an unreliable nature at best. See *C.I.R. v. Glenshaw Glass Co.*, 348 U.S. 426, 75 S. Ct. 473, 99 L.Ed. 483 (1955). This Court has also held that the principle of re-enactment does not mean that the prior construction has become so embedded in the law that only Congress can effect a change. It gives way before changes in the prior rule or practice through exercise by an administrative agency of its rule-making power. See *Helvering v. Reynolds*, 313 U.S. 428, 61 S. Ct. 971, 85 L.Ed. 1438 (1941).

On occasion, courts have refused to follow prior interpretations where it was shown that they were not later considered by the re-enacting body. See, *e.g.*, *Mitchell v. C.I.R.*, 300 F.2d 533 (4th Cir. 1962); *Pacific Power & Light Co. v. Federal Power Commission*, 184 F.2d 272 (D.C. Cir. 1950). The re-enactment rule is merely an aid to statutory construction. It should not stand in the way of re-examination by this Court of a prior decision where such re-examination is necessary to remove incongruities and inconsistencies in the jurisdictional fabric of Indian law.

Conclusion

Draper v. United States failed fully to consider the express disclaimer of jurisdiction provision with which the Court was confronted and did not mention a controlling statute. Further doubt has been cast upon its validity by the more recent decisions of the Court.

Taken together, the statutory pattern, legislative history, and numerous decisions of this Court show that there has been a consistent intent of Congress through the years to reserve jurisdiction over Indian lands to the federal or Indian courts, depending upon the offense. *Draper* is aberrational, has been undercut by numerous subsequent decisions of this Court, and accordingly should now be overruled.

It is respectfully submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NEW MEXICO-ARIZONA ENABLING ACT

Sec. 20. That the delegates to the convention thus elected shall meet in the hall of the house of representatives in the capitol of the Territory of Arizona at twelve o'clock noon on the fourth Monday after their election, and they shall receive compensation for the period they actually are in session, but not for more than sixty days in all; after organization they shall declare on behalf of the people of said proposed State that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed State, all in the manner and under the conditions contained in this Act. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State—

. . . .

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belong-

ing to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

18 U.S.C. Sec. 1152

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

APPENDIX B.

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

STATE OF ARIZONA, Appellee, v. FRANCIS HAMILTON GRISWOLD, Appellant.	No. 1717

Appeal from the Superior Court of Apache County

The Honorable Melvyn Shelley, Judge

Judgment Affirmed

Darrell F. Smith Attorney General	Phoenix
Gary K. Nelson Assistant Attorney General	Phoenix
Attorneys for Appellee	
Lewis, Roca, Scoville, Beauchamp & Linton By John J. Flynn Paul G. Ulrich	Phoenix
Attorneys for Appellant	

LOCKWOOD, Justice:

Defendant, a sixty-four year old man, upon a plea of guilty, was pronounced guilty of the second degree murder of his wife. A hearing in mitigaton of sentence was held. Following the hearing the defendant was sentenced to not less than thirty-six nor more than forty years in the State Prison.

The first claim made by the defendant is that the Superior Court of Apache County was without jurisdiction to try this case for the reason that the alleged crime occurred on an Indian Reservation. The defendant urges this Court to rule that the only Court with jurisdiction to hear this matter is the Federal Court, although both the defendant and the victim were non-Indians.

Sections 20(2) of the Enabling Act, A.R.S., 36 Stat. 569 and Art. 20, Para. 4 of the Arizona Constitution provide that the Indian Reservations "* * * shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; * * *." The existence of this disclaimer clause might seem to support the contention of the defendant. However, the United States Supreme Court has ruled that when the accused and the victim are both non-Indians the state courts have exclusive jurisdiction to try the case even though the alleged crime occurred on an Indian Reservation. United States v. McBratney, 104 U.S. 621, 26 L.Ed 869 (1881). This rule applies unless there is language changing it in the Enabling Act which provided for the admission of Arizona as a state.

The Enabling Act which provided for the admission of Montana into the Union in 1889, stated almost exactly what twenty-one years later was stated in the Arizona Enabling Act and Constitution. After Montana became a state, a crime was committed by one non-Indian against another non-Indian upon an Indian Reservation. Trial was had in the Federal Court. The United States Supreme Court ruled that the provision in the Enabling Act, (similar to the one later adopted by Congress for Arizona) regarding jurisdiction over Indian Reservations, had not changed the rule that states had exclusive jurisdiction over the crimes

committed on Indian Reservations involving non-Indians. Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed 419 (1896). By employing almost the same language interpreted in the Draper case, supra, in the Arizona Enabling Act, we conclude Congress manifested an intent to accept the United States Supreme Court's determinaton that the state has jurisdiction over crimes involving non-Indians committed on Indian Reservations. Thus, this case was properly brought in the state court.

The appellant next contends that the imposition of a sentence of not less than thirty-six nor more than forty years is excessive in light of special circumstances. In mitigation of sentence the defendant points out the following facts: (1) his age; (2) his good reputaton as a substantial business man within the community, and (3) his lack of a criminal record save for a conviction for drunken driving. We have stated on many occasions that this Court will not upset the sentence imposed by the trial judge so long as that sentence is within the statutory limitations and is not an abuse of judicial discretion. State v. Valenzuela, 101 Ariz. 230, 418 P.2d 386 (1966); State v. Bradley, 99 Ariz. 328, 409 P.2d 35 (1965).

In the hearing held by the trial judge to determine what sentence should be imposed upon this defendant there was evidence admitted to show that the defendant had threatened the life of his own son. There was also medical evidence demonstrating that the defendant was a man of intemperate moods. It was not improper for the trial judge to consider this testimony in light of his responsibility to society. We will not say that under the cir-

cumstances of this case the trial judge abused his discretion in imposing such a severe penalty.

Judgment affirmed.

LORNA E. LOCKWOOD, Justice

CONCURRING:

CHARLES C. BERNSTEIN, Chief Justice

ERNEST W. McFARLAND, Vice Chief Justice

FRED C. STRUCKMEYER, JR., Justice

JESSE A. UDALL, Justice